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Supreme Court, U.S.
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No. 97 1307 FEB 9 - 1998

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In The

Supreme Court of the United States

October Term, 1997

REGIONAL TRANSPORTATION DISTRICT,

Petitioner,

vs.

ELAM CONSTRUCTION, INC.; JOHN T. DOOLITTLE & ASSOCIATES, INC.; and TRANSIT '97, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Tenth Circuit Court of Appeals err in ruling that the Regional Transportation District is not an "arm of the state" to be accorded Eleventh Amendment immunity, and in stating the most important factor in an analysis of such immunity is whether a judgment against the entity would be paid from the state treasury, when the case involved equitable claims and not a money judgment?

2. If more than one factor is to be considered to determine if a governmental entity is an "arm of the state," what factors should be weighed, and how? Are the factors to be exclusive or inclusive? What facts are relevant in resolving situations with conflicting indicia?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Regional Transportation District, a statutory special district and political subdivision of the State of Colorado ("RTD"), and the Respondents, Elam Construction, Inc., a Colorado corporation; John Doolittle & Associates, Inc., a Connecticut corporation; and Transit '97, Inc., a Colorado corporation and issue committee (hereinafter referred to collectively as "Elam").

RTD has no parent companies, subsidiaries, or affiliates to list pursuant to SUP. CT. R. 29.6.

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The Regional Transportation District, a statutory special district and political subdivision of the State of Colorado ("RTD"), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 129 F.3d 1343 (10th Cir. 1997). It is reprinted in the appendix hereto, p. 1a, *infra*.

The decision of the United States District Court for the District of Colorado is not reported. It is, however, reprinted in the appendix hereto, p. 11a, *infra*.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on October 17, 1997. A Petition for Rehearing was filed October 21, 1997, and denied November 10, 1997 (App., *infra*, 27a). The jurisdiction of this Court to review the judgment of the Court of Appeals for the Tenth Circuit is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case was initiated as a constitutional challenge to a Resolution by the RTD Board of Directors. However, this Petition is limited to RTD's submission that it is an "arm of the state" immune from suit in federal courts.

In 1997, the Colorado General Assembly authorized RTD to submit the following question to the District's electorate: Should RTD be allowed to increase the District's sales tax from

six tenths of one percent to one percent to generate revenue to finance the construction and operation of a fixed guideway mass transit system and additional Park-n-Ride lots, and to expand existing Park-n-Ride lots and bus service? *See* COLO. REV. STAT. § 32-9-119.3 (1997). The plan to finance and construct this system, lots and service with the additional sales tax revenues became known as the "Guide the Ride" plan. On May 20, 1997, the RTD Board passed a resolution adopting the "Guide the Ride" plan and agreed to submit the question of whether to increase the sales tax to their electorate by referendum in the November 7, 1997 election. Campaigns and committees were subsequently formed by opponents and proponents of "Guide the Ride," and fundraising followed.

Board members soon became aware of the public's perception that large contributions to such campaigns were unduly influencing, if not out-right buying, votes on the referendum. The Board grew concerned that its electorate would believe that contributors would be rewarded after the election by receiving contracts with the RTD, or by having their competitors denied such contracts. This concern increased when viewed in the context of general public distrust of the political process. To correct this negative perception and instill the electorate's confidence in the Board's governance, the Board passed Resolution No. 15, Series of 1997 (Resolution #15), on August 19, 1997. The Resolution stated that in the event the "Guide the Ride" referendum passes, RTD would not contract until the year 2015 with any individual or entity who donated more than $100 after August 1, 1997, to any campaign whose purpose was to affect the outcome of the referendum.

On September 3, 1997, Elam filed suit in the United States District Court for the District of Colorado, seeking: (1) a declaratory judgment that Resolution #15 was unconstitutional

and a permanent injunction against enforcement thereof; and (2) a mandatory injunction requiring RTD notify all persons and entities previously notified regarding the Resolution's passage that Resolution #15 had been declared invalid and unconstitutional. Elam simultaneously filed a Motion for Preliminary Injunction and Request for Emergency Hearing Upon Motion for Preliminary Injunction.

Elam's Motion was granted, and after a hearing thereon, the District Court ordered: (1) that Resolution #15 was unconstitutional; (2) that RTD was enjoined and prohibited from enforcing or further acting upon Resolution #15; and (3) that RTD provide notice by mailing to all persons to whom it had previously sent notice of the adoption of Resolution #15, as well as publication to readers of four newspapers, that the District Court had enjoined enforcement of the Resolution. The Court also ordered that the hearing on Elam's request for a permanent injunction be held November 20, 1997, more than two weeks after the election.

Thereafter, RTD filed a Motion to Dismiss Elam's Complaint and Vacate Order of September 5, 1997, on the grounds that Elam's Complaint failed to allege proper jurisdiction over the subject matter and over RTD, and failed to state a claim upon which relief could be granted. This Motion argued that RTD, as an arm of the State of Colorado, is immune pursuant to the Eleventh Amendment, that RTD is not a "person" under 42 U.S.C. § 1983, and that no other authority relied upon by Elam conferred jurisdiction.[1]

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1. Elam's Complaint states that the action arises under the First and Fourteenth Amendments, and under 42 U.S.C. §§ 1983 and 1988, and that jurisdiction lies pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), 2201 and 2202.

The District Court ruled that whether RTD is entitled to Eleventh Amendment immunity depends

> on the characterization of the entity under state law, the guidance and control exercised by the state, the degree of state funding, and the entity's ability to provide for its own financing by levying taxes and issuing bonds. The most important factor in determining whether a governmental entity is entitled to Eleventh Amendment immunity is whether a judgment against it would be paid from the state treasury. *Elam Constr., Inc. v. RTD*, No. 97K1909, slip op. at 6 (D.Colo., Oct. 16, 1997) (citation omitted).

Applying these factors, the District Court concluded RTD is not an arm of the State for Eleventh Amendment purposes.

Meanwhile, on September 10, 1997, in the Court of Appeals for the Tenth Circuit, RTD had filed a Notice of Appeal and Motion for Expedited Appeal. The following day, Elam filed an Emergency Motion for Suspension of Rules and for Immediate Determination of Appeal on the Merits. Noting the mutual sentiment for an expedited determination of the matter, the Tenth Circuit directed the Parties to file simultaneous briefs by September 24, 1997. In its brief, RTD alleged the court lacked jurisdiction since RTD was not a "person" within the meaning of 42 U.S.C. § 1983, and no other section alleged as jurisdictional bases in Elam's Complaint provided a basis for relief. After consideration of the Parties' briefs, the Tenth Circuit issued an order September 29, 1997, requiring the Parties to submit additional briefs regarding four jurisdictional concerns.

One of the issues briefed in the Parties' Supplemental Briefs was whether the Eleventh Amendment provided immunity to

RTD from suit in federal courts. In its Supplemental Brief, RTD argued, *inter alia*, that it was immune pursuant to the Eleventh Amendment and referenced the fact that the so-called "functional approach" to classifying entities had been endorsed by the Colorado Supreme Court in *Durango v. Durango Transp., Inc.*, 807 P.2d 1152 (Colo. 1991).[2]

Yet, the Tenth Circuit held that RTD was a political subdivision of the State of Colorado, not an arm of the State of Colorado, was not entitled to Eleventh Amendment immunity, and was a "person" within the meaning of Section 1983. In its analysis of Eleventh Amendment immunity, the Tenth Circuit utilized a test of five factors: (1) the state law characterization of the entity; (2) the guidance and control that the state exercises over the entity; (3) the degree of state funding the entity receives; and (4) whether the state has empowered the entity to issue bonds and levy taxes. The Court further held that "[t]he state's potential legal liability is of central importance." (App., *infra*, 5a). Applying what it perceived to be the relevant factors, the Tenth Circuit concluded that since Colorado statutes characterize RTD as a political subdivision, the State's guidance and control over RTD's operations are minimal compared to the operational powers conferred upon the District by statute, and the public fisc is not responsible for judgments entered against the RTD, RTD is not entitled to immunity under the Eleventh Amendment.

RTD timely filed a Petition for Rehearing on October 21, 1997. Its Petition was denied November 10, 1997.

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2. As explained below, this "functional approach" was expressly applied to RTD by the Colorado Supreme Court in *RTD v. Dept. of Labor*, 830 P.2d 942 (Colo. 1992) (finding RTD was not a municipality and did not perform a municipal function).

REASONS FOR GRANTING THE WRIT

RTD submits that the decision of the Tenth Circuit Court of Appeals decided an important federal question in a way that conflicts both with decisions of the Colorado Supreme Court and with relevant decisions of this Court. The Tenth Circuit Court of Appeals' decision, in holding RTD is not an arm of the State of Colorado, contravenes a 1992 Colorado Supreme Court ruling that RTD is not a municipality. The Tenth Circuit Court of Appeals' decision also sets forth an analysis for Eleventh Amendment determinations which contradicts the balancing test enunciated by the Colorado Supreme Court in a 1997 opinion. Finally, the Tenth Circuit Court of Appeals' decision differs from this Court's Eleventh Amendment decisions. RTD therefore requests this Court grant its Petition for a Writ of Certiorari pursuant to SUP. CT. R. 10, subparts (a) and (c).

I.

AN IMPORTANT FEDERAL QUESTION: THE ELEVENTH AMENDMENT.

The Eleventh Amendment provides:

> [t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State. United States Constitution, Amendment XI.

The Eleventh Amendment also prohibits actions in federal courts against an unconsenting state by one of its own citizens, *Hans v. Louisiana*, 134 U.S. 1 (1890), and against

governmental entities classified as "arms of the state." *See Meade v. Grubbs*, 841 F.2d 1512 (10th Cir. 1988). As this Court once stated, "[t]he Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity." *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (citation omitted).

Governmental entities, including RTD, are entitled to the protections of the United States Constitution and its Amendments. However, RTD and other similarly-situated entities are being improperly denied protection under the Eleventh Amendment as the result of conflicting and ambiguous standards comprising Eleventh Amendment determinations. Therefore, RTD implores this Court to grant its Petition for Writ of Certiorari, reverse the Tenth Circuit Court of Appeals' decision in this matter, and clarify the analysis for Eleventh Amendment immunity. A clear mandate from this Court setting forth the necessary and optional factors for Eleventh Amendment analyses, as well as the weight to be attributed those factors, is warranted.

RTD further submits that any analysis set forth by this Court must give due deference to the functions of the entity, state law creating and interpreting the entity's functions, and state control over the entity. The Tenth Circuit Court of Appeals' decision should not have emphasized whether a judgment against RTD would be paid from the State treasury as *Elam's* Complaint sought only equitable relief.

Resolving the parameters of Eleventh Amendment "arm of the state" determinations is also crucial to analyses of related claims, such as civil rights actions under 42 U.S.C. § 1983. *See Howlett v. Rose*, 496 U.S. 356 (1990) (an entity with Eleventh Amendment immunity is not a "person" within the

meaning of § 1983); *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989) (Eleventh Amendment arm of the state analysis must be applied to determine whether a state-created entity is a "person" under § 1983); and *Elam* (App. *infra*, 7a) (where the Tenth Circuit in this case found RTD not an "arm of the state," but a local governmental entity, and a "person" for purposes of § 1983).

II.

THE TENTH CIRCUIT COURT OF APPEALS' DECISION IN THIS MATTER DECIDED AN IMPORTANT FEDERAL QUESTION IN CONFLICT WITH RELEVANT DECISIONS OF THE COLORADO SUPREME COURT AND THE UNITED STATES SUPREME COURT.

In *Elam Constr., Inc. v. RTD*, 129 F.3d 1343 (10th Cir. 1997) (App., *infra*, 1a) ("*Elam*"), the Tenth Circuit held that RTD was a political subdivision of the State of Colorado, not an arm of the State, and that RTD does not participate in Colorado's Eleventh Amendment immunity. In so holding, it relied upon the following analysis:

> [i]n determining whether a particular entity such as RTD is an "arm of the state" or a "political subdivision" of Colorado, we examine such elements as "the state law characterization of the entity, the guidance and control that the state exercises over the entity, the degree of state funding the entity receives, and whether the state has empowered the entity to issue bonds and levy taxes."

(App., *infra*, 4a) (citation omitted). The Tenth Circuit then emphasized that the State's potential legal liability is of central importance in this analysis. *Id.*

The *Elam* opinion also refers to *Duke v. Grady Mun. Sch.*, 127 F.3d 972 (10th Cir. 1997),[3] as the Tenth Circuit's

> most current and comprehensive discussion of the various Eleventh Amendment factors that should be considered in deciding whether an entity is an "arm or the state" or a "political subdivision of the state."

(App., *infra*, 5a).

Thus, the Tenth Circuit described the Eleventh Amendment analysis as one dependent upon consideration of five specific factors, one of which was primary, and referenced the five factors in its *Duke* decision. This analysis does not mandate that all factors be considered, or that factors not mentioned be excluded, nor does it clearly address what courts should do if factors are at odds with the concern for protecting the state treasury. Similarly, *Duke* does not resolve how to reconcile conflicting indicia.[4] As such, the "analysis" enunciated by the

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3. In *Duke*, the Tenth Circuit considered the following factors in its analysis of Eleventh Amendment immunity: (1) control/local autonomy; (2) designation under state law; (3) state court interpretations; (4) fiscal independence (where funding originates, power to levy taxes); and (5) state treasury liability for judgments. *Id.* at 978-980. The *Duke* court ruled that "[t]he final, but the most important, factor is whether the state treasury would be at risk of paying a judgment against a . . . school district or board. . . ." *Id.* at 980.

4. In *Duke*, the Tenth Circuit held that

> [b]ecause this most important factor [of state treasury liability] suggests there should be no eleventh amendment immunity, and because most of the other relevant factors

(Cont'd)

Tenth Circuit for determining Eleventh Amendment immunity is confusing, and ripe for inconsistent interpretation and application.

Moreover, the "analysis" from the Tenth Circuit in *Elam* produced a ruling inconsistent with that of the Colorado Supreme Court in *RTD v. Dept. of Labor*, 830 P.2d 942 (Colo. 1992).

III.

ELAM, IN HOLDING RTD IS NOT AN ARM OF THE STATE, CONTRADICTS *RTD v. DEPT. OF LABOR*, HOLDING RTD IS NOT A MUNICIPALITY.

In applying what it perceived to be the proper test of Eleventh Amendment immunity, the Tenth Circuit ruled on this

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(Cont'd)

> point the same way, we hold that school districts and their governing boards in New Mexico are not arms of the state. . . .

Id. at 981.

Therefore, *Duke* did not have to resolve situations presenting conflicting indicia of immunity. Its only guidance for reconciling conflicting factors was a statement that, "when indicators of immunity point in different directions the Eleventh Amendment's twin reasons for being remain our prime guide." *Id.* at 978 (citation omitted). These twin reasons are described in note 10 as the desire to protect the state treasury and to protect state sovereignty. Still, no specific, practical explanation of how to best protect state sovereignty or explanation for dealing with conflicting "twin reasons" is set forth. *Cf. Hess v. Port Auth. Trans-Hudson Corp.*, 130 L. Ed. 2d 245, 264-265 (1994) (O'Connor, J., dissenting) (pointing out that under majority opinion, suits against entity in federal court pose no affront to a state's dignity).

important question of federal law in conflict with Colorado Supreme Court precedent. In *RTD v. Dept. of Labor*, *supra*, the Colorado Supreme Court adopted a "functional approach" to evaluate whether RTD was a municipality or performing a municipal function. As explained by the Colorado Supreme Court:

> Under the functional approach to nondelegation issues, therefore, we examine whether the function in question is truly local in the sense that, principally if not exclusively, it affects only those persons within the boundaries of the governmental unit in question and whether the political processes make those who perform the function responsive to the electorate within the affected area. *RTD v. Dept. of Labor, supra*, at 946.

Applying this "functional approach," the court then examined: (1) the creation of RTD by special enabling legislation; (2) the fact that "RTD is not a multiple purpose governmental entity, such as a city or county, providing general local government services"; (3) the structure of RTD making certain officials fully answerable to the electorate within its boundaries; and (4) the functioning of RTD as a matter of statewide concern. *Id.* at 946-947. The court concluded that RTD is *not* a municipality. *Id.* (emphasis added).

This holding, that the RTD is not a municipality, is conversely indicative of the fact that RTD is an arm of the State. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (Eleventh Amendment determination "turns on whether [Petitioner] . . . is to be treated as an arm of the State . . . *or is instead* to be treated as a municipal corporation or other political subdivision . . . .") (emphasis added); *Accord Casillan v. RTD*, No. 90S1722 (D. Colo., Dec. 10, 1991)

(App., *infra,* 32a) (whether RTD is a "person" subject to 42 U.S. § 1983 "presents two alternatives: either the RTD is more like a state type of authority . . . or it is more like a municipal authority. . . .").

RTD v. Dept. of Labor is consistent with prior Colorado Supreme Court law adopting the "functional approach" to define the term "municipal". *Durango v. Durango Transp., Inc.*, 807 P.2d 1152, 1156 (Colo. 1991), held:

> in modern usage, the scope of the term "municipal" is to be determined by reference to the particular function to be performed rather than by strict adherence to the classification of the governmental entity performing that function as a city, county, or other unit of government.

Notwithstanding, the Tenth Circuit's opinion in this matter fails to recognize or distinguish the "functional approach" as even a consideration in its Eleventh Amendment analysis. *Cf. Hess v. Port Auth. Trans-Hudson Corp.*, 130 L. Ed. 2d 245, 258 (1994) (entity's functions are a consideration in Eleventh Amendment inquiry).

In sum, it is inconsistent to determine whether an entity is a municipality and therefore not an arm of the state by utilizing a functional approach, but analyze if that same entity is an arm of the state and thus not a municipal or local entity by employing a multi-factor analysis that does not defer, or even consider, the entity's functions. Yet, *Elam* holds RTD is not an arm of the State; *RTD v. Dept. of Labor* holds RTD is not a municipality. RTD is stayed in conceptual purgatory by this conflict.

IV.

ELAM'S ELEVENTH AMENDMENT ANALYSIS CONTRAVENES THE BALANCING TEST ENUNCIATED BY THE COLORADO SUPREME COURT IN *SIMON*.

Elam's five factor analysis of Eleventh Amendment immunity, emphasizing the liability of the state treasury for any judgment against the entity, also conflicts with the Colorado Supreme Court's opinion in *Simon v. State Compensation Ins. Auth.*, 946 P.2d 1298 (Colo. 1997). In *Simon*, the Colorado Supreme Court recognized that lower federal and state courts have relied upon numerous factors to determine whether a particular state-created entity is an arm of the state. The court then held that in evaluating whether an entity is entitled to Eleventh Amendment immunity, a *balancing* test is necessary. *Id.* at 1305 (emphasis added). After identifying only three factors for consideration: (1) how state law characterizes the entity; (2) whether the entity is autonomous and free from the control of the state; and (3) whether a judgment against the entity would ultimately be paid by the state, the court held that "these factors are part of a balancing test and . . . it is necessary to consider all three factors before reaching a conclusion as to the entity's immunity status." *Id.* The court rejected the respondent's argument "that the state treasury criterion is the most important factor and should be held dispositive." *Id.* at 1306. Therefore, *Simon* requires examination of only three factors in Eleventh Amendment determinations, and specifies a "balancing" thereof. RTD respectfully submits it is characterized as a nonmunicipality (thus as an arm of the state) by state law, that it is not free from control of the State (such as by continuous state statutory amendment), and that this case does not deal with money judgment issues.

V.

ELAM ALSO DIFFERS FROM ELEVENTH AMENDMENT JURISPRUDENCE FROM THIS COURT.

Although this Court's standards for determining if a governmental entity is an "arm of the state" historically have varied, *Elam*'s multi-factor analysis differs from relevant decisions of this Court. A comparison of four of this Court's Eleventh Amendment opinions is demonstrative:

Lake County Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979), considered the Eleventh Amendment immunity of an agency created by interstate compact to coordinate and regulate land development in the Lake Tahoe area. This Court held that the Agency was not an arm of the state by relying upon six factors: (1) that the Agency was designated in the compact as a "separate legal entity" and a political subdivision; (2) that the majority of Agency governing members were appointed by counties not the states; (3) that the Agency was exclusively funded by the counties; (4) that the compact stated the Agency's obligations were not binding on the states; (5) the regulation of land use was a local, not state-wide concern; and (6) that the states did not have veto power over the rules and regulations promulgated by the Agency. However, no one factor was identified as dispositive, ostensibly setting forth a balancing scheme.

Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), concluded that a local school board was not an arm of the state after considering only four factors: (1) how local school districts were characterized under state law; (2) whether the school board was subject to the guidance of the state; (3) whether the school board received significant funding from the state; and (4) whether the school board had the power

to raise its own funds. Without placing a particular emphasis on any of these four factors, the Court held that "on balance," the school board was more like a county or city than an arm of the state.

In *Regents of the Univ. of California v. Doe*, 117 S. Ct. 900, 904 (1997), this Court held that,

> the question whether a money judgment against a state instrumentality or official would be enforceable against the State is important to any evaluation of the relationship between the State and the entity. . . .

However, this Court also recognized that its cases have sometimes focused on the nature of the entity created by state law to determine if it should be treated as an arm of the state. *Id.* Moreover, the decision was limited in scope given that the Court declined to address whether it should look beyond the potential impact of an adverse judgment on the state treasury and examine the entity's function and degree of self control.

Finally, an Eleventh Amendment defense was analyzed under six factors in *Hess v. Port. Auth. Trans-Hudson Corp.*, 130 L. Ed. 2d 245 (1994): (1) local versus state control; (2) the characterization and definition of the entity in its enabling and implementing legislation; (3) state court interpretations and characterization of the entity; (4) the functions of the entity; (5) the financial independence of the entity; and (6) the legal liability of the state for the entity's debts. *Id.* at 258-259. When indicators of immunity point in different directions, *Hess* directs that "the Eleventh Amendment's twin reasons for being [States' dignity and their financial solvency] remain our prime guide." *Id.* at 259.

Thus, Eleventh Amendment jurisprudence from this Court has wavered. However, *Elam*, applying a five factor test emphasizing the impact of any adverse judgment against the entity on the state treasury, further confuses the parameters of Eleventh Amendment determinations.

VI.

A CLARIFYING MANDATE FROM THIS COURT IS NECESSARY TO CORRECT PERVASIVE CONFUSION THROUGHOUT THE CIRCUITS AS TO THE CORRECT ELEVENTH AMENDMENT ANALYSIS.

In the wake of these four Supreme Court decisions, the opinions from the Colorado Supreme Court set forth above, and *Elam,* lies ambiguous and undecided jurisprudence. The resulting confusion throughout the federal system as to the relevant and necessary factors of Eleventh Amendment analyses is evident in just a sampling of district court decisions from the previous twelve months:

In the First Circuit, a federal district court has relied heavily upon "the nature of the entity created by a state law," in determining whether a governmental entity is an arm of the state. *Lebron v. Ashford Presbyterian Community Hosp.*, 975 F. Supp. 407 (D.P.R. 1997).

In the Fifth Circuit, a district court in Texas chose a six factor test,[5] and considered whether a damage award will

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5. (1) Whether the entity can sue and be sued in its own name; (2) whether the entity has the right to hold and use property; (3) the degree of authority independent from the state; (4) whether the entity is concerned with local or statewide problems; (5) whether the damage award will ultimately come from the state treasury; and (6) whether state statutes and case law consider the agency an arm of the state. *Id.* at *4-5.

ultimately be paid from the state treasury "only one" of those factors. *Correa v. City of Bay City*, No. G97378, 1997 U.S. Dist. LEXIS 16804, at *3-4. (S.D. Tex., Oct. 23, 1997). In that same circuit, a Louisiana U.S. district court held that the most significant factor in assessing an entity's status is whether a judgment against it would be paid with state funds. *Chaney v. New Orleans Public Facility Management, Inc.*, No. 964023, 1997 U.S. Dist. LEXIS 17952, at *4 (E.D. La. Nov. 10, 1997). However, the *Chaney* court further held there are five additional factors[6] that "must" be examined and ruled only after considering the above factors "in combination." *Id.* at *2 and *7. Another Louisiana decision held that it was bound by factors set forth in Fifth Circuit case law "and relevant Louisiana case law," in its Eleventh Amendment determination. *Hudson v. Hughes*, No. 95566, 1997 U.S. Dist. LEXIS 15024, at *2 (E.D. La., Sept. 29, 1997).

In the Sixth Circuit, the most important factor in resolving the question of Eleventh Amendment immunity was held to be whether any monetary judgment would be paid out of the state treasury. *Butler v. Ottawa County Dept. of Social Serv.*, No. 1:96CV822, 1997 U.S. Dist. LEXIS 19447, at *6 (W.D. Mich., Oct. 9, 1997). However, the court in *Butler* also referenced: (1) precedent finding similar entities to be instrumentalities of the state; (2) the fact that the agency at issue was responsible for carrying out a state law; and (3) the entity's enabling and governing legislation. *Id.*

And in *Lundberg v. Univ. of Nebraska*, No. 4CV953448, 1997 U.S. Dist. LEXIS 6346, at *4 (D. Neb., March 26, 1997),

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6. (1) Whether the state statutes and case law characterize the entity as an arm of the state; (2) the degree of local autonomy; (3) whether the entity is concerned primarily with local or statewide problems; (4) whether the entity can sue and be sued in its own name; and (5) whether the entity has the right to hold and use property. *Id.* at *2-3.

from the Eighth Circuit, the court relied upon prior decisions analyzing Eleventh Amendment immunity by examining the entity's degree of local autonomy and control, as well as whether the funds to pay an award would be derived from the state treasury. However, seven additional factors, including whether the entity is performing a governmental or proprietary function, were also cited with approval. *Id.*

Lundberg and the cases cited above demonstrate the dilemma posed by the current confusion pervasive in Eleventh Amendment analyses: If, for example, the *Lundberg* analysis is proper, then the Tenth Circuit in *Elam* should have considered common law from the U.S. District Court for the District of Colorado finding that RTD functions more like an arm of the state government than a local county or municipal authority. *Casillan v. RTD*, No. 90S1722 (D. Colo., Dec. 10, 1991) (App. *infra*, 29a). Colorado state court case *RTD v. Romer*, No. 93CV3069 (D. Colo., Nov. 18, 1993), would likewise be relevant, as it held that RTD is a government, not a government-owned business, and not an enterprise.

VII.

THE SOLUTION.

A pronouncement from this Court on the factors exclusively and inclusively relevant to Eleventh Amendment determinations is warranted. The Tenth Circuit, the Colorado Supreme Court, and lower federal courts addressing this issue and claims dependent upon an "arm of the state" analysis flounder with whether some or all factors enunciated in the case law are required or even appropriate. Guidance is also necessary with respect to whether Eleventh Amendment analyses are balancing tests, or if one factor is dominant, as well as what courts must specifically analyze when considerations of immunity conflict.

The analysis enunciated should not place primary importance upon whether a judgment would be paid out of the state treasury. The state treasury is simply not at issue in many suits involving Eleventh Amendment determinations. *Elam*, a case seeking declaratory and injunctive relief, is but one example. Where monetary damages are not at issue, such financial considerations are irrelevant. *See also Hess, supra,* at 267 (O'Connor, J., dissenting) ("that the vulnerability of the state treasury is determinative has support neither in w. . . [this Court's] precedents nor in the literal terms of the Eleventh Amendment").

Rather, the entity's functions should receive primary consideration. *See RTD v. Colorado Dept. of Labor, supra*, at 947 (concluding "the functioning of RTD is a matter of statewide concern"); *Casillan v. RTD*, No. 90S1722 (D. Colo., Dec. 10, 1991) (holding RTD functions more like an arm of the State government, than any local county or municipal authority) (App., *infra*, 29a); COLO. REV. STAT. § 32-9-106 (1997) (RTD's area includes all or portion of six counties); and COLO. REV. STAT. § 32-9-103(b) (1997) (RTD's eminent domain powers are superior to that of cities, towns and counties for acquiring mass transportation facilities and related property).

An appropriate analysis should also consider the characterization of state law in creating and interpreting the functions of the entity. *See* COLO. REV. STAT. § 32-9-101, *et seq.* (1997) (special enabling legislation); *RTD v. Colorado Dept. of Labor, supra* (RTD is not a municipality); *RTD v. Romer, supra* (RTD is a government); COLO. REV. STAT. § 32-9-102(1)(a) (1997) (creation of RTD will promote the health, safety, convenience, economy and welfare of the District's residents *and of the State)* (emphasis added); COLO. REV. STAT. § 32-9-119.7(1) (1997) (surface transportation in Denver metropolitan area is a major problem "confronting not

only the citizens of the metropolitan area but also citizens of the entire state of Colorado"); and COLO. REV. STAT. § 32-9-107.5(1)(a)(I) (1997) ("construction of a fixed guideway mass transit system in the Denver metropolitan area is a matter of statewide concern").

In addition, the degree of state control should be included as a relevant consideration. *See Hess, supra*, at 268 (O'Connor, J., dissenting) (proper question is whether the State possesses sufficient *control* over an entity that the entity may properly be called an extension of the State); COLO. REV. STAT. § 32-9-115 (1997) (identifying three types of audits of RTD); and COLO. REV. STAT. § 32-9-119.7(7) (1997) (requiring RTD submit any requested information, data, and audits to the transportation legislation review committee). As Justice O'Connor stated in her dissenting opinion in *Hess, supra*, at 269: "the control test goes further than the Court's single factor in assuring state governments the critical flexibility in internal governance that is essential to sovereign authority."

CONCLUSION

RTD submits that it is an arm of the State of Colorado and entitled to Eleventh Amendment immunity. Yet, the test of Eleventh Amendment immunity in the Tenth Circuit and in the State of Colorado is conflicting and confusing, crying out for this Court's intervention and clarifying mandate. RTD further submits that whether a judgment against a governmental entity such as RTD would be paid from the state treasury is an inappropriate consideration, especially where monetary damages are not at issue. Any pronouncement from this Court as to the considerations of the Eleventh Amendment analyses should therefore only accord deference to the entity's function, its characterization under state law, and the degree of control exercised by the state.

For the foregoing reasons, RTD's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED OCTOBER 28, 1997

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 97-1312

ELAM CONSTRUCTION, INC., a Colorado corporation; JOHN T. DOOLITTLE & ASSOCIATES, INC., a Connecticut corporation, TRANSIT '97, INC., a Colorado corporation and issue committee,

Plaintiffs-Appellees,

v.

REGIONAL TRANSPORTATION DISTRICT, a statutory special district and political subdivision of the State of Colorado,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. 97-D-1909)

* * *

Before EBEL, KELLY, and BRISCOE, Circuit Judges.

PER CURIAM.

Appendix A

Defendant-Appellant Regional Transportation District (RTD) appeals from the district court's order granting preliminary injunctive relief to plaintiffs. This court previously denied RTD's motion for stay pending appeal and ordered expedited briefing on the merits. We now affirm the order of the district court.[1]

RTD is a statutory special district which provides public transportation services in the Denver regional area. *See generally* Colo. Rev. Stat. §§ 32-9-101-164. RTD is funded in part by sales taxes paid within its District. *See id.* § 119(2)(a). During the 1997 legislative session, the Colorado legislature authorized RTD to submit to the voters a referendum increasing the current RTD sales tax rate from the current six-tenths of one percent to a total of one percent, for the purpose of financing certain construction and improvement projects commonly referred to as the "Guide the Ride" plan. *See id.* § 119.3. RTD submitted the referendum to the voters for approval in the ballot issue election to be held on November 4, 1997.

At its regular meeting on August 19, 1997, RTD's board of directors adopted Resolution No. 15, Series of 1997, entitled " 'Guide the Ride' is Not for Sale." Resolution No. 15's stated purpose was to avoid "the influence of special interests and financially concerned forces" on the referendum election. The resolution provided that in the event the sales tax referendum was successful, RTD would not enter into any financial or contractual relationship, until the year 2015, with any individual

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1. After examining the expedited briefs filed, and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

or entity which had donated more than $100.00 to any campaign seeking to affect the outcome of the referendum. Existing contracts were exempted, as were donations made on or prior to August 1, 1997.

Plaintiffs Elam Construction, Inc. and John T. Doolittle & Associates, Inc., claim that Resolution No. 15 has chilled the exercise of their First Amendment rights of political speech and association by preventing them, at the cost of losing contracts with RTD, from contributing funds in excess of $100.00 to a campaign in connection with the referendum. Plaintiff Transit '97, Inc., a principal campaign advocate of the "Guide the Ride" referendum, asserts that Resolution No. 15 has resulted in substantial constriction and official muzzling of its ability to engage in political speech and association and to communicate its political message concerning the referendum issue. Plaintiffs sued RTD pursuant to 42 U.S.C. § 1983 and the Declaratory Judgment Act, 28 U.S.C. § 2201, contending that Resolution No. 15 violated their First Amendment rights. The district court, finding that Resolution No. 15 had created an impermissible chilling effect on plaintiffs' First Amendment rights, preliminarily enjoined RTD from enforcing the resolution. It also required RTD to provide notice of the injunction to parties previously notified of the resolution. RTD appealed to this court from the district court's order. *See* 28 U.S.C. § 1292(a).

In its opening brief in this court, RTD argued that it was an arm of the state of Colorado, and therefore not a "person" subject to suit under § 1983. *See, e.g., Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). Because the Declaratory Judgment Act does not itself confer jurisdiction on the federal courts, RTD's argument, if successful, could have meant that the district court lacked jurisdiction to entertain this action. *See,*

e.g., Cardtoons. L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 964 (10th Cir. 1996). Moreover, although RTD did not argue that it possessed Eleventh Amendment immunity, its contention that it was an "arm of the state" caused us to raise sue sponte the issue of whether this action was barred by the Eleventh Amendment. *See Flores v. Long*, 110 F.3d 730, 732-33 (10th Cir. 1997). After further jurisdictional briefing, we now conclude that RTD is a political subdivision of the state of Colorado, is not an arm of the state of Colorado, does not participate in Colorado's Eleventh Amendment immunity, and is a "person" within the meaning of § 1983. The district court therefore had jurisdiction to entertain this action.

The Eleventh Amendment immunizes states from suits in law or equity, including injunctive actions. *See Cory v. White*, 457 U.S. 85, 90-91 (1982). Under the arm-of-the-state doctrine, this immunity extends to entities created by state governments which operate as their alter egos or instrumentalities. *See Mascheroni v. Board of Regents*, 28 F.3d 1554, 1559 (10th Cir. 1994). It does not, however, extend to political subdivisions of the state, such as counties or municipalities. *See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979).

In determining whether a particular entity such as RTD is an "arm of the state" or a "political subdivision" of Colorado, we examine such elements as "the state law characterization of the entity, the guidance and control that the state exercises over the entity, the degree of state funding the entity receives, and whether the state has empowered the entity to issue bonds and levy taxes." *Mascheroni*, 28 F.3d at 1559. Historically, the most important consideration is whether a judgment against the entity would be paid from the state treasury. *See Hess v. Port Authority*

Trans-Hudson Corp., 513 U.S. 30, 48 (1994). The state's potential legal liability is of central importance. *See Regents of the University of Cal. v. Doe*, 117 S. Ct. 900, 904 (1997). For our most current and comprehensive discussion of the various Eleventh Amendment factors that should be considered in deciding whether an entity is an "arm of the state" or a "political subdivision of the state," see *Duke v. Grady Municipal Schools*, __F.3d__, No. 96-2135 (10th Cir. Oct. 20, 1997) (concluding that a local school district in New Mexico was not an "arm of the state" of New Mexico, and therefore not entitled to Eleventh Amendment immunity, and overturning our previous decision of *Martinez v. Board of Education*, 748 F.2d 1393 (10th Cir. 1984) pursuant to unanimous en banc authority).

The Colorado Statutes provide that RTD shall have "the duties, privileges, immunities, rights, liabilities and disabilities of a public body politic and corporate," and that it "shall be a political subdivision of the state." Colo. Rev. Stat. § 32-9-119(1)(a). RTD's statutory powers include the ability to "sue and be sued," *id.* § 32-9-119(1)(d), to " borrow money and to issue district securities evidencing same," *id.* § 32-9-119(1)(f), to "levy and cause to be collected taxes on all taxable property within the district," *id.* § 32-9-119(1)(i), to "fix and from time to time increase or decrease the revenues for services and facilities provided by the district," *id.* § 32-9-119(1)(m), and to "levy uniformly throughout the district a sales tax" creating "revenue to finance the operations of the district, to defray the cost of construction of capital improvements and acquisition of capital equipment, and to pay the interest and principal on securities of the district," *id.* § 32-9-119(2)(a). RTD is also granted "all rights and powers necessary or incidental to implied from the specific powers granted in this article," *id.* § 32-9-119(1)(x).

Appendix A

The state of Colorado exercises very little oversight over the day-to-day operations of RTD. RTD is required to make recommendations to the state highway legislative review committee, *see id.* § 32-9-119.7(5), (7), and to present a copy of its annual budget to the transportation legislative review committee for review of statutory budgeting criteria, *see id.* § 32-9-119.7(4). The state auditor may, upon affirmative vote of the legislature, be required to audit RTD. *See id.* § 32-9-115(3).

By statute, RTD is required to pay all judgments recoverable against it from its own reserves, appropriated or unappropriated funds, or to levy its own tax for that purpose. *See id.* § 24-10-113. Bonds issued by RTD "shall not in any way create or constitute any indebtedness, liability, or obligation of the state or of any political subdivision thereof, except the district." *Id.* § 32-9-145.

Applying the factors outlined above, we conclude (1) that the state of Colorado has explicitly characterized RTD as a "body . . . corporate" and a "political subdivision" of the state; (2) that the guidance and control exercised by the state over RTD's operations are minimal in comparison with the operational powers conferred upon the district by statute; (3) that RTD has been vested with nearly total responsibility for its own funding; and (4) that the public fisc of the state of Colorado is not responsible for judgments entered against RTD. RTD, then, is a "political subdivision" of the state of Colorado, and not an "arm of the state." As such it does not participate in Colorado's Eleventh Amendment immunity.

RTD's argument that it is not a "person" under § 1983 also fails. In *Monell v. Department of Social Services*, 436 U.S. 658,

690 n.54 (1978), the Supreme Court held that "local government units which are not considered part of the State for Eleventh Amendment purposes" are "persons" within the meaning of z§ 1983. As RTD indicates, the Supreme Court later held that states and their officials acting in their official capacities are not "persons" for § 1983 purposes. *See Will*, 491 U.S. at 71. The Supreme Court specifically stated, however, that this holding did not affect its previous decision in *Monell*. *See id.* at 70 ("Conversely, our holding here does not cast any doubt on *Monell*, and applies only to States or governmental entities that are considered 'arms of the state' for Eleventh Amendment purposes."). RTD, which is not an "arm of the state," but is rather a local governmental entity, is a "person" for purposes of § 1983.

Having concluded that the district court had jurisdiction over this action, we turn to the merits. We review the district court's order granting a preliminary injunction for abuse of discretion. *See Walmer v. United States Dep't of Defense*, 52 F.3d 851, 854 (10th Cir.), *cert. denied*, 116 S. Ct. 474 (1995). In order to establish their entitlement to preliminary injunctive relief, plaintiffs must show that they will suffer irreparable injury unless the injunction issues; that the threatened injury to them outweighs the damage the injunction may cause to the opposing party; that the injunction, if issued, would not be adverse to the public interest; and that there is a substantial likelihood that plaintiffs will succeed on the merits. *See id.*, We consider plaintiffs' likelihood of success on the merits first, as that element requires the most detailed analysis.

In *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290 (1981), the Supreme Court considered the constitutionality of a municipal ordinance placing

a dollar limitation on contributions to committees formed to support or oppose ballot referenda. The California Supreme Court had found the ordinance constitutional "because it ensured that special interest groups could not 'corrupt' the initiative process by spending large amounts to support or oppose a ballot measure." *Id.* at 293. The Supreme Court reversed. It drew a distinction between limitations on contributions to candidates for political office and their committees, which are permitted in order to avoid corruption, *see Buckley v. Valeo,* 424 U.S. 1 (1976), and limitations on contributions to committees seeking to support or oppose a ballot measure. In contrast with the restrictions permitted for contributions to candidates, the Court held, "there is no significant state or public interest in curtailing debate and discussion of a ballot measure." *Citizens Against Rent Control/ Coalition for Fair Housing*, 454 U.S. at 299; *see also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) ("Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue.").

RTD concedes the force of these precedents, but asserts that they are inapplicable here. This referendum election, RTD argues, is more like a "candidate" election than a typical "ballot issue" election. RTD contends that after the election, its board will function like a successful political candidate, distributing revenue in response to requests for proposals and bids, and contracts for projects purchased with the additional sales tax revenues. Therefore, it argues, this election presents a very real danger of corruption, or perceived corruption, not ordinarily present in a referendum election.

We cannot accept RTD's contention that monies spent advocating or opposing the increased sales tax is the equivalent of a "contribution" to the RTD board. The effect of contributions here differs radically from that of the typical contribution designed to further the election of a political candidate. At its most basic, the outcome of the referendum will not directly affect the composition of the RTD board, or the compensation of its members, which is fixed by statute. *See* Colo. Rev. Stat. § 32-9-117. Moreover, even assuming that the RTD board can be likened to a "candidate" in the referendum election, there has been no showing that contributions to organizations advocating passage of the referendum are "coordinated" in any way with RTD's own "campaign" efforts on behalf of the referendum. Rather, such contributions are better analogized to "independent" expenditures on behalf of a candidate, which cannot be limited without running afoul of basic First Amendment protections. *See Buckley*, 424 U.S. at 46-51; *see also Colorado Republican Fed. Campaign Comm. v. FEC*, 116 S. Ct. 2309, 2315-17 (1996) (plurality opinion).

We conclude that plaintiffs have amply shown that they are likely to succeed on the merits of their challenge to Resolution No. 15. We also agree with the district court that allowing Resolution No. 15 to remain in effect will result in a chilling effect on plaintiffs' First Amendment rights, constituting an irreparable harm to their interests. RTD's asserted interest in preventing corruption, in light of its use of an impermissible restriction on speech, does not outweigh the harm asserted by plaintiffs. The public interest also favors plaintiffs' assertion of their First Amendment rights. For the foregoing reasons, the district court did not abuse its discretion, either in enjoining enforcement of Resolution No. 15, or in requiring RTD to provide notice of the injunction to persons whose First

Amendment rights may have been chilled by previous notice of its provisions.[2]

The order of the United States District Court for the District of Colorado granting a preliminary injunction to plaintiffs, entered October 16, 1997, nunc pro tunc, September 5, 1997, is AFFIRMED.

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2. RTD has presented additional materials to this court which it did not present to the district court. RTD argues that the district court should have granted its requested continuance of the preliminary injunction hearing so that it could present these materials and other, unspecified evidence or argument against the injunction. We do not consider materials submitted to us for the first time on appeal. *See John Hancock Mutual Life Ins. Co. v. Weisman,* 27 F.3d 500, 506 (10th Cir. 1994) (summary judgment case). RTD fails to show that the district court abused its discretion by denying the requested continuance.

APPENDIX B — ORDER ON MOTION TO DISMISS AND WRITTEN PRELIMINARY INJUNCTION ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO FILED OCTOBER 16, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 97-K-1909

ELAN CONSTRUCTION, INC., a Colorado corporation; JOHN T. DOOLITTLE & ASSOCIATES, INC., a Connecticut corporation; and TRANSIT '97, INC., a Colorado corporation and issue committee,

Plaintiffs,

v.

REGIONAL TRANSPORTATION DISTRICT, a statutory special district and political subdivision of the State of Colorado,

Defendant.

ORDER ON MOTION TO DISMISS
AND
WRITTEN PRELIMINARY INJUNCTION ORDER

KANE, J.

On September 3, 1997, Plaintiffs Elam Construction, Inc., John Doolittle & Associates, Inc. and Transit '97, Inc filed a Complaint for Declaratory and Injunctive Relief, a Motion for Preliminary Injunction, and a Request for Emergency Hearing upon Motion for Preliminary Injunction. They seek emergency

declaratory and injunctive relief against Defendant Regional Transportation District (RTD) to invalidate a board resolution which Plaintiffs assert restricts the exercise of their rights and those of others to engage in free political speech and association regarding a pending ballot issue, as well as the public's right to receive communications of public interest and concern as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. The complaint states the action arises under the First and Fourteenth Amendments and 42 U.S.C. § 1983 and 1988 and that jurisdiction lies pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), 2201, and 2202.

The Motion for Preliminary Injunction requests emergency injunctive relief enjoining RTD, together with its agents, officers, directors and employees from enforcing or taking any other action pursuant to or in furtherance of Board Resolution No. 15, Series of 1997. It seeks a further injunction requiring RTD to provide immediate personal notice and direct official notice to all persons to whom it has sent notice of the adoption of Resolution No. 15 and to the public at large.

I set a hearing on the preliminary injunction for September 5, 1997. Without complying with D.C.Colo.LR 7.1, RTD requested a continuance of the hearing. I denied the request. I considered the allegations in the Plaintiffs' pleadings, if true, indicative of an immediate violation of First Amendment rights and that, in light of the allegations regarding the upcoming date of election, time did not afford the luxury of a continuance.

The emergency hearing on the preliminary injunction was held on September 5, 1997. At the conclusion thereof I issued an injunction and a mandatory injunction. I denied RTD's request for a stay of the injunction pending its appeal to the

Appendix B

Tenth Circuit Court of Appeals. On September 8, 1997, I entered a minute order iterating the dates and deadlines set at the hearing.

On September 10, 1997, RTD filed a Notice of Appeal to the Tenth Circuit regarding the Order entered on September 5, 1997. On September 12, 1997, RTD submitted a Proposed Notification of Injunction regarding Resolution No. 15. RTD proposed language for direct and personal notification to bidders and proposers who were previously informed of the passage of Resolution No. 15 and a format and language for publication of the September 5, 1997 order. Plaintiffs filed a response objecting to that sentence of the proposed notices referring to RTD's request for a stay of the September 5, 1997 order and appeal to the Tenth Circuit on the grounds that the sentence defeated the purpose of the mandatory preliminary injunction.

On September 12, 1997, I issued an order approving RTD's proposed notification and publication subject to the Plaintiff's objection which I sustained. I ordered RTD to issue and cause to be published as previously ordered the proposed notification and publication save and except for the last sentence of both submitted versions. On September 23, 1997, RTD filed an Answer to the complaint.

On October 9, 1997, the Tenth Circuit entered an Order advising that it had all briefing necessary to decide the appeal and was ready to rule. The court of appeals stated that none of the parties had submitted to it a written order of injunction as required by Fed. R. Civ. P. 58 and 65(d) and that such order was essential to the determination of the appeal. The court abated consideration of the appeal until Tuesday, October 14, 1997 at 9:00 a.m. It ordered the parties, before that time to obtain and file with the clerk of that court a written order of injunction

signed by me which complied with Rules 58 and 65 of the Federal Rules of Civil Procedure.

On October 9, 1997, counsel for Plaintiffs delivered a letter to my chambers attaching the Order of the Tenth Circuit of that same day. Counsel also enclosed a written Proposed Order for Preliminary Injunction, which attempted to conform with the transcript of my order from the bench. By copy of the letter, Plaintiffs, counsel requested counsel for RTD to forward any comments regarding the contents of the proposed order to me.

On October 10, 1997, RTD filed a Motion to Dismiss Plaintiffs' Complaint and Vacate September 5, 1997 Order. The motion seeks dismissal pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(2) and 12(b)(6) on the grounds that the complaint fails to allege proper jurisdiction over the subject matter and over RTD, and fails to state a claim upon which relief can be granted. On the same day, Plaintiffs filed a response to RTD's motion and RTD filed a reply.[1]

Also on October 10, 1997, the Tenth Circuit entered a further order noting that it had been advised that I was unavailable and abated the matter until close of business on Thursday October 16, 1997, requiring the parties on or before that date and time to obtain and file a written order of injunction signed by me "which complies with Rules 58 and 65 of the Federal Rules of Appellate [sic] Procedure." Since the Rules of Appellate Procedure number only forty-eight, I assume the order refers to Rules 58 and 65 of the Federal Rules of Civil Procedure.

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1. The motion to dismiss, response and reply were filed in one day with the expectation of a ruling thereon by 9:00 a.m. on the next. Let it never again be said that the wheels of justice turn slowly!

Appendix B

I. *Motion to Dismiss*

RTD argues, as an arm of the State of Colorado, it is immune pursuant to the Eleventh Amendment of the United States Constitution. Further, RTD asserts, the complaint does not allege any statutory bases which support Plaintiffs' First and Fourteenth Amendment claims as 42 U.S.C. only applies in actions against a "person" and RTD is not a "person" for the purposes of that statutory section. The other statutory sections cited by Plaintiffs are procedural only, RTD argues, and do not confer jurisdiction in the absence of a claim under Section 1983 RTD therefore requests the dismissal of the complaint and that I vacate the September 5, 1997 order which was entered under the erroneous assumption of jurisdiction.

Plaintiffs state RTD has raised the issues stated in the motion to dismiss for the first time on appeal of this court's September 5, 1997 order granting the preliminary injunction. The Tenth Circuit has, in response, ordered supplemental briefing by the parties on the issues raised in the motion to dismiss. Plaintiffs refer to the October 9, 1997 Order of the appeals court advising that it "is ready to rule" on these issues, among others, as soon as it receives the formal written injunction from this court. Plaintiffs consider it prudent to wait and abide by the imminent ruling of the Tenth Circuit concerning the issues raised by the RTD in its new motion to dismiss. In reply, RTD points out that lack of subject matter jurisdiction may be asserted at any time by any interested party.

Although I would prefer not to rule on matters which the Tenth Circuit's impending ruling will undoubtedly address, before entering a written order of injunction, I think I must consider the jurisdictional issues raised in the motion to dismiss.

Appendix B

The Eleventh Amendments immunity has consistently been held to extend to "arm[s] of the State." *Mt. Healthy City Sch. Dist. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). It has, however, just as consistently been held not to extend to "a municipal corporation or other political subdivision" of the state. *Id.* While an agency of the state may fall under the protective umbrella of the Amendment, political subdivisions of the state do not." *Meade v. Grubbs*, 841 F.2d 1512, 1525 (10th Cir. 1988).

Recently, the Tenth Circuit explained:

> Whether a governmental entity is entitled to Eleventh Amendment immunity turns on the characterization of the entity under state law, the guidance and control exercised by the state, the degree of state funding, and the entity's ability to provide for its own financing by levying taxes and issuing bonds. *The most important factor in determining whether a governmental entity is entitled to Eleventh Amendment immunity is whether a judgment against it would be paid from the state treasury.*

Sonnenfeld v. City and County of Denver, 100 F.3d 744, 749 (10th Cir 1996) (citations omitted) (emphasis added), *cert. denied*, 117 S. Ct. 1997). In *Sonnenfeld*, the appeals court found the City of Denver was not entitled to Eleventh Amendment immunity notwithstanding the fact that it was carrying out state policy in building an airport.

RID was created and functions pursuant to the Regional Transportation District Act. Colo. Rev. Stat. §§ 32-9-101 to 32-9.7-102 (1997). Its purpose is "to develop, maintain, and

operate a mass transportation system for the benefit of the inhabitants of the district." Colo. Rev. Stat. § 32-9-107. RTD's enabling statute describes it as "a political subdivision of the state" with the "duties, privileges, immunities, rights, liabilities, and disabilities of a public body politic and corporate." *Id.* § 32-9-119(1)(a). It has the power to provide revenue to finance its operations and "to levy uniformly throughout the district a sales tax. . . ." *Id.* § 32-9-119(2)(a).

With regard to RTD's liabilities, "nothing . . . shall be construed to authorize the district to incur any indebtedness on behalf of or in any way to obligate the state or any political subdivision thereof, except the district." *Id.* § 32-9-145. With regard to tort claims against it, RTD does not have recourse to the state treasury. Every district or political subdivision is required to pay all judgments recoverable against it from its own reserves, appropriated or unappropriated funds, or to levy its own tax for that purpose. *Id.* § 24-10-113.

I take the law as recently given me in *Sonnenfeld* and apply the criteria in that case for determining Eleventh Amendment immunity. RTD's enabling statute expressly characterizes it a "political subdivision" and gives it extensive operational powers, including vesting it with almost total responsibility for its own funding. Most importantly, RTD has no recourse to the state treasury in the event of a judgment against it. Based on the relevant factors set out in *Sonnenfeld*, I find no basis for affording RTD Eleventh Amendment immunity.

With regard to whether RTD is a "person" under 42 U.S.C. § 1983, the Supreme Court held in *Monell v. Department of Social Services*, 436 U.S. 658, 690 (1978), that Congress intended municipalities and other local government units to be

included among those persons to whom § 1983 applies. In *Will v. Michigan Department of State Police*, the Court noted "person" in § 1983 did not include the States of the Union and that the holding in *Monell* is limited to local government not considered arms of state for Eleventh Amendment purposes. 491 U.S. 58, 69-70 (1989), *Will* found the phrase "bodies politic and corporate" to mean "corporations, both private and public (municipal) and not to include the States," *Id.* Significantly, RTD is defined as "a political subdivision of the state" with the powers of "a public body politic and corporate." Colo. Rev. Stat. 32-9-119(1)(a) (1997).

I have concluded RTD is not an arm of state for Eleventh Amendment purposes. Following *Will*, I find RTD is a person under *Monell* for the purposes of a § 1983 claim.[2]

IT IS ORDERED THAT RTD's Motion to Dismiss Plaintiffs' Complaint and Vacate September 5, 1997 Order is DENIED.

II. *Written Preliminary Injunction Order.*

I enter this written order of injunction based on my detailed order from the bench at the close of the emergency hearing on

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2. Defendant cites two unpublished *nisi prius* employment decisions: (i) *Cassilan v. RTD*, Civil Action No. 90-S-1722 (D. Colo. Dec. 10, 1991), determining RTD not to be a "person" under § 1983, applying the "functional approach;" and (2) *Horton v. RTD*, Civil Action No. 91-Z-714 (D. Colo. July 28, 1993) to the effect that, because RTD's enabling statute defines it as a political subdivision of the state, it is not a "person" within the meaning of § 1983. In light of the Tenth Circuit's express holding in *Meade v. Grubbs*, 841 F.2d at 1525 that political subdivisions of the state do not fall under the umbrella of the Eleventh Amendment and the more recent decision in *Sonnenfeld*, I reject these decisions as unpersuasive.

Appendix B

September 5, 1997 and the subsequently approved notification and publication of the contents thereof. The order is framed in the present tense and is intended to operate *nunc pro tunc*.

A. *Background.*

During the 1997 legislative session, the General Assembly of the State of Colorado enacted legislation authorizing the RTD to submit to the eligible electors of the district, at a general or ballot issue election, the question of whether the RTD shall be authorized to increase its sales tax rate throughout the district to one percent for the purpose of financing various specific construction and improvement projects pursuant to a Board-adopted plan popularly known as "Guide the Ride."

Under newly enacted Colo. Rev. Stat 32-9-119.3 (1997), on May 20, 1997, the RTD Board of Directors passed a Board resolution adopting the "Guide the Ride" plan and submitting the statutorily mandated ballot question to the district's electors by referendum to be voted upon at the ballot issue election to be held on November 4, 1997.

A debate has commenced concerning the sales tax increase and construction and expansion programs to be financed thereby. Plaintiff Transit '97 is the principal campaign issue committee advocating passage of the referendum.

At its regular monthly meeting on August 19, 1997, the RTD Board of Directors adopted Resolution No. 15, Series of 1997, entitled " 'Guide the Ride' is Not for Sale." Citing concern "with the influence of special interests and financially concerned forces," the Resolution pertinently provides:

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> . . . in the event the "Guide the Ride" sales tax referendum wins passage, the district will not enter into any financial or contractual relationship, until the year 2015 with any individual or entity who donates more than $100 00 after August 1, 1997,[3] in a contribution or a contribution in kind as defined by Colorado Statute 1-45-103, directly or indirectly, to any campaign whose purpose was to effect [sic] the outcome of the referendum. Any contracts with such individuals or entities in place before the election shall remain in place. However, no further contracts will be entered into with such individuals or entities.

Resolution No. 15 further provides that should the referendumm pass, the RTD staff is directed to compile a list of campaign donors for provision to the Board, media and staff "in order that they may use it in evaluating bidders." The resolution instructs the RTD staff to "inform all merchants on its list of perspective [sic] bidders" of the resolution by "whatever means deemed most efficient and speedy" to include publication in trade and news publications.

B. *Requirements for Preliminary Injunction Orders*

I find Plaintiffs have shown the requirements for a preliminary injunction are satisfied, *See Walmer v. United States Dep't of Defense*, 52 F.3d 851, 854 (10th Cir.), *cert. denied,* 116 S. Ct. 474 (1995). I consider each of those requirements.

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3. There was testimony at the emergency hearing that there was an amendment to Resolution 15 that gave a later date than that of August 1, 1997. No copy of the amendment was submitted. I do not consider this of import for the purposes of considering the request for injunctive relief.

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(i) *Irreparable Injury.*

The first requirement is that Plaintiffs must show irreparable injury. They assert they will suffer irreparable injury unless a preliminary injunction issues forthwith because Resolution No. 15 chills their and others' exercise of their First Amendment rights of political expression and association during a critical period in a short campaign.

I agree. Without doubt, the loss of First Amendment Freedoms constitutes irreparable injury. That has been the position of the Supreme Court for as long as I can recall. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Local Organizing Comm., Denver Chapter, Million Man March v. Cook*, 922 F. Supp. 1494, 1500 (D. Colo. 1996).

(ii) *Balance of Hardships.*

The second consideration is the balance of hardships. The threatened existing injury to Plaintiffs is the irreparable constriction of their First Amendment rights to engage in core political speech and association regarding an important public issue. The damage to RTD in this instance would be to limit its ability to unconstitutionally muzzle those taking an active position on the ballot issue and ensure they cannot fund the expression of their views. Such muzzling is clearly contrary to existing law. Thus the threatened injury to Plaintiffs fundamental outweighs whatever speculative damage the proposed injunction may cause the RTD. *See Local Organizing Committee, Denver Chapter, Million Man March*, 922 F. Supp. at 1501.

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(iii) *Public Interest.*

In considering what is in the public interest, it is axiomatic that the preservation of First Amendment rights serves the public's best interest. *See id.*

(iv) *Likelihood of Success on the Merits.*

The final consideration is the likelihood of the Plaintiffs' succeeding on the merits. The right to join together "for the advancement of beliefs and ideas, includes the right to pool money through contributions in order to make advocacy effective. *Buckley v. Valeo*, 424 U.S. 1, 65-66 (1976). The RTD's imposition of a constrictive and focused contribution limit of $100 is unconstitutional and violates freedoms of both political expression and association.

Resolution No. 15 seeks to impose an unconstitutional condition upon availability of a discretionary governmental benefit by withholding "any financial or contractual relationship until the year 2015" with the RTD in the event the "Guide the Ride" ballot issue passes, unless a potential beneficiary relinquishes a protected constitutional right. The Supreme Court has held such "unconstitutional conditions" impermissible in *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

There is no constitutional justification for Resolution No. 15's purpose to mute those persons who may perceive a financial benefit in a particular outcome of an issue election. It is a clear and egregious violation of the First Amendment, more troubling in light of its passage in the face of legal advice doubting its constitutionality.

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There is an exception to the rule that limits on political activity are contrary to the First Amendment. However, that exception relates to the regulating or limiting contributions to or expenditures of a candidate or candidate's committee. "[T]here is no significant state or public interest in curtailing debate and discussion of a ballot measure." *Citizens Against Rent Control/ Coalition for Fair Housing v. City of Berkeley,* 454 U.S. 290, 299 (1981). For the aforesaid reasons, I find Plaintiffs have shown a likelihood of success on the merits. Accordingly, *nunc pro tunc* September 5, 1997,

IT IS ORDERED THAT a preliminary injunction be entered forthwith enjoining and prohibiting the Defendant RTD, together with all of its agents, officers, directors and employees from enforcing, seeking to enforce, or taking any other action pursuant to or in furtherance of Resolution No. 15, Series of 1997, or any other similar effort to control, intimidate, limit or interfere with the exercise of First Amendment rights.

IT IS FURTHER ORDERED THAT RTD by and through its agents and employees provide immediate personal and direct official notice at its expense in the form approved by me directed to all persons to whom it has previously sent notice of the adoption of Resolution No. 15 and to the public at large through publication in the Rocky Mountain News, the Denver Post, the Boulder Daily Camera and the Intermountain Jewish News, advising such persons and the public at large that this court has enjoined enforcement of the described resolution. Plaintiffs submit that this mandatory portion of their requested injunctive relief in necessary to restore the status quo and to undo the unconstitutional chilling effects created by the RTD's prior communications on this subject. I find this to be correct and that these are reasonable measures to correct the chilling which has taken place so far.

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IT IS FURTHER ORDERED THAT, with regard to the request for a permanent injunction, the matter will be heard on Thursday, November 20, 1997 and will continue thereafter until decided. Any amendment to pleadings by the Plaintiffs or the Defendant shall be upon motion only to be filed no later than October 13, 1997. Discovery is to be completed on or before November 1, 1997. Trial briefs, if any, are to be filed on or before November 15, 1997.

IT IS FURTHER ORDERED THAT the issue of attorney fees will be litigated at the same time as the trial. Both parties are to be prepared with accurate time records and expert testimony on the reasonableness and amounts of attorney fees expended in this case, which will be considered by this court as costs.

IT IS FURTHER ORDERED THAT a bond is to be posted in the amount of one dollar. That amount is to be deposited with the Clerk of this court before the preliminary injunction becomes effective.

Dated this 16th day of October, 1997 at Denver, Colorado.

s/ John L. Kane, Jr.
JOHN L. KANE, JR.
U.S. SENIOR DISTRICT COURT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED NOVEMBER 14, 1997

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 97-1312

ELAM CONSTRUCTION, INC., a Colorado corporation; JOHN T. DOOLITTLE & ASSOCIATES, INC., a Connecticut corporation; TRANSIT '97, INC., a Colorado corporation and issue committee,

Plaintiffs - Appellees,

v.

REGIONAL TRANSPORTATION DISTRICT, a statutory special district and political subdivision of the State of Colorado,

Defendant - Appellant.

ORDER

Filed November 14, 1997

Before **EBEL**, **KELLY**, and **BRISCOE**, Circuit Judges.

The Court, in order to correct a clerical error in the issuance of this order dated November 10, 1997, hereby reissues the order with the correct panel that denied the petition for rehearing.

The order is reissued nunc pro tunc and is to read as follows:

The appellant's petition for rehearing is denied by the panel that rendered the decision.

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No judge in regular active service or member of the panel which rendered the decision requested a vote on the suggestion for rehearing en banc, accordingly, rehearing en banc is denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: s/ illegible
Deputy Clerk

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED NOVEMBER 10, 1997

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 97-1312

ELAM CONSTRUCTION, INC., a Colorado corporation; JOHN T. DOOLITTLE & ASSOCIATES, INC., a Connecticut corporation; TRANSIT '97, INC., a Colorado corporation and issue committee,

Plaintiffs - Appellees,

v.

REGIONAL TRANSPORTATION DISTRICT, a statutory special district and political subdivision of the State of Colorado,

Defendant - Appellant.

ORDER

Filed November 10, 1997

Before **SEYMOUR**, Chief Judge, **PORFILIO**, **ANDERSON**, **TACHA**, **BALDOCK**, **BRORBY**, **EBEL**, **KELLY**, **HENRY**, **BRISCOE**, **LUCERO** and **MURPHY**, Circuit Judges.

The appellant's petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as

required by Fed. R. App. P. 35. A poll was called and a majority of the active judges voted to deny rehearing en banc.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: s/ illegible
Deputy Clerk

cc: Klein
Haggerty
Nichal

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO IN *CASILLAN v. REGIONAL TRANSPORTATION DISTRICT, AMALGAMATED TRANSIT UNION, LOCAL 1001, MICHAEL GARCIA, RICHARD BAUMAN, ROBERT GARSIDE, ED RHATICAN, PETE PEREA, BERNIE SNYDER, GEORGE STANKO, AND GREGG FISHER*
FILED DECEMBER 10, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel B. Sparr

Civil Action No. 90-S-1722

JOHN CASILLAN,

Plaintiff,

v.

REGIONAL TRANSPORTATION DISTRICT, AMALGAMATED TRANSIT UNION, LOCAL 1001, MICHAEL GARCIA, RICHARD BAUMAN, ROBERT GARSIDE, ED RHATICAN, PETE PEREA, BERNIE SNYDER, GEORGE STANKO, AND GREGG FISHER,

Defendants.

ORDER

THIS MATTER comes before the Court on the motions to dismiss filed by Defendant Regional Transportation District (RTD) and Defendant Amalgamated Transit Union, Local 1001 (ATU). The Court has reviewed the motions, the applicable

law and is fully advised in the premises, and having heard oral argument on these motions makes the following ORDER.

This court will consider the sufficiency of pleadings in the Plaintiff's (second amended) complaint within the four corners of the complaint. The court will not consider extrinsic documents or questions of fact in considering the motions to dismiss and will rule on the motions as a matter of law only. Dismissal under Rule 12(b)(6) requires a legal determination that the plaintiff can prove no set of facts which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In considering the complaint, all well-pleaded facts, as distinguished from conclusory allegations, must be taken as true. *Swanson v. Bixler*, 750 F.2d 810 (10th Cir. 1984). The Tenth Circuit has also recognized that the Federal Rules of Civil Procedure erect a powerful presumption against rejecting pleadings for failure to state a claim. *Morgan v. City of Rawlins*, 792 F.2d 975, 978 (10th Cir. 1986), *quoting Auster Oil & Gas, Inc. v. Stream*, 764 F.2d 381 (5th Cir. 1985), *cert. denied*, 488 U.S. 848 (1988).

Many portions of Plaintiff's complaint can be easily considered conclusory allegations, thereby frustrating the court's efforts to examine the particular allegation under the well-pleaded facts rule mentioned above. As is a consequence of the plethora of conclusory allegations, Rule 8 notice considerations are also implicated. With regard to the level of specificity required here, the Tenth Circuit has recognized that factual pleading is required only insofar as it is necessary to place a defendant on notice as to the type of claim alleged and the grounds upon which it rests, thereby enabling a defendant to prepare a responsive pleading. *Mountain View Pharmacy v. Abbott Laboratories*, 630 F.2d 1383, 1388 (10th Cir. 1980). The court would note

here that the only motions which have been filed by defendants RTD and ATU are motions to dismiss or in the alternative, for summary judgment, and no motion for more definite statement has been filed. The court limits its examination for 12(b)(6) purposes, as well as regarding Rule 8 considerations, to the complaint alone. The court would note that the Plaintiff in his response to Defendant RTD's motion to dismiss refers on several occasions to what he can prove at trial. The court will focus on the pleadings in the complaint alone, and whether the allegations contained therein state claims for relief. Plaintiff has not moved to amend his complaint.

I. Plaintiff's 42 U.S.C. § 1983 Claims

Plaintiff has five separate allegations linked with § 1983 in his complaint at paragraphs 4, 5, 6 and 7. The first claim is contained in paragraph 1, and alleges a conspiracy among all the named Defendants to deprive Plaintiff of his rights under § 1981, § 1983, and the First, Fourth, Fifth, Ninth, and Fourteenth Amendments, based on an alleged retaliatory discharge. (This claim is also identified as a Title VII claim.) The second claim, in paragraph 4, is against Defendants RTD, Rhatican, Stanko and Fisher, and alleges that the Plaintiff was terminated for filing a charge of national origin discrimination. This claim is framed as a violation of Title VII, § 1981, § 1983, and the Equal Protection clause of the Fourteenth Amendment of the Constitution. The third claim Plaintiff describes appears in paragraph 5, and is against Defendants RTD, Rhatican, Fisher, and Stanko. This claim alleges violation of the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. Plaintiffs alleges here that since the he was being investigated for disciplinary violations, he had a reasonable expectation of privacy with respect to his thoughts and mental processes. The fourth claim

in paragraph 6 (also against Defendants RTD, Rhatican, Fisher, and Stanko) claims that the Plaintiff was deprived of procedural due process under the 14th amendment because RTD terminated Plaintiff without following appropriate policies and procedures. The fifth claim is found in paragraph 7 (again against Defendants RTD, Rhatican, Fisher, and Stanko) based on the alleged abuse of official power by RTD in its arbitrary and capricious termination of Plaintiff without cause. Plaintiff has framed this issue as a substantive due process claim as violative of the Fourteenth Amendment.

In order to state a claim for relief under § 1983, a plaintiff must be able to demonstrate that he was deprived of a right secured by the Constitution or laws of the United States, and that any such deprivation was achieved under color of law. *Wise v. Bravo*, 666 F.2d 1328 (10th Cir. 1981, citing *Paul v. Davis*, 424 U.S. 693 (1975), *reh'g denied*, 425 U.S. 985 (1976). Section 1983 creates no substantive rights, it provides a remedy for the violation of rights originating from other sources, namely the Constitution or laws of the United States. See *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979).

The court will consider the second prong of the prima facie case first — concerning whether the actors were persons acting under color of state law. The only claims with which the court is concerned here are federal in nature. Any common law tort claims against RTD would be barred for an apparent failure by the Plaintiff to file notice of his intent to sue as required by the Colorado Governmental Immunity Act, C.R.S. § 24-10-109 (1988). *Pfeiffer v. Hartford Fire Insur. Co.*, 929 F.2d 1484, 1487 (10th Cir. 1991). It does not appear that there are any common law claims against the RTD or other Defendants, apart from an allegation concerning conspiracy.

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The first issue which must be considered in addressing this claim concerns the status of Defendant Regional Transportation District (RTD), and precisely, whether RTD is a "person" for purposes of the § 1983 statute.

The organic statute creating RTD is found at C.R.S. § 32-9-101, *et seq.* (1973) and it provides that RTD (as a special district) has the duties, privileges, immunities, rights, liabilities and disabilities of a public body politic and corporate. It also provides that the District shall be a political subdivision of the state. § 32-9-119(a). The court is faced with construing the import of this language for the purposes of determining whether RTD is a "person" subject to § 1983. The question presents two alternatives: either the RTD is more like a state type of authority (*e.g.*, an agency or department) and would thereby not be a person for § 1983 purposes, *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989); or it is more like a municipal authority, which could be subject to § 1983 liability where it follows a policy violative of constitutional rights, *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), or where it follows a custom or policy which is facially valid but in implementation is violative of constitutionally protected rights. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989).

The Colorado Supreme Court has not ruled on the particular question of RTD's status for § 1983 purposes, so this court will have to look to analogous rulings. A recent ruling by the Supreme Court of Colorado, en banc, is instructive here. In *City of Durango v. Durango Transportation, Inc.*, 807 P.2d 1152 (Colo. 1991), the Colorado Supreme Court considered the nature of the term "municipal" in its decision reversing the

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Court of Appeals decision that the La Plata county mass transportation system is subject to Public Utilities Commission (PUC) jurisdiction. The decision discusses several aspects of the changing relationship between municipalities and counties.

In *City of Durango*, the court contrasted the broad and narrow approaches (from a number of different states) to construing the term municipal. Although this was done in the context of Colorado regulatory law, this court finds the board discussion of "municipal" compelling. Much of this discussion was necessitated, the court noted, by the inclusion of counties in the term "municipal" as a by-product of their increased role in the provision of services which were (are) considered to be municipal functions. *Id.* at 1156 (citations omitted). The court concluded that a functional approach is the proper means for analyzing the nature of a particular service, by examining the "particular function to be performed rather than by strict adherence to the classification of the governmental entity performing that function as a city, county, or other unit of government." *Id.* In the case before this court, however, there is only a broad classification of RTD as a political subdivision of the state. The court will accordingly apply the "functional approach" adopted by the *City of Durango* court, and examine the function of the RTD as a political entity. The RTD, consistent with the purposes of Title 32 of the Colorado Revised Statutes concerning special districts (see § 32-1-203), serves a metropolitan multiple county district created specially by the Colorado legislature to promote the welfare of the residents of the district as well as the state of Colorado (§ 32-9-102(a)).

The RTD was created as a special district, as such, it engenders the following characteristics: (1) it differs from such general units of local government as municipalities and counties

in that the special district provides only one or a few related functions; (2) it enjoys a high degree of fiscal and administrative independence from all other governments, thus differentiating them from subordinate districts and from most public authorities; and (3) typically they are not geographically coterminous with other units of government, but overlap municipal, county, and sometimes even state lines. Reynolds, Local Government Law, § 11 at 27 (1982).

The proper focus of the court's attention is whether the RTD can be considered a person for § 1983 purposes. The court properly examines here the function of the RTD, not limiting the analysis to the particular status of the particular "person" involved. *See Valdez v. City & County of Denver*, 878 F.2d 1285 (10th Cir. 1989). This approach is consistent with the approach discussed above which was taken recently by the Colorado Supreme Court. Only as a secondary matter does the court concern itself with Eleventh Amendment issue. *See Will v. Michigan Department of State Police*, 491 U.S. at 66-67. Due to the nature of its creation by statute for the Denver metropolitan area, by the establishment of a supra-municipal or county authority, the appointment of the board of directors by county authorities (C.R.S. § 32-9-110, 32-9-112 (1973)), and the ability to create revenue by the collection by the state director of revenue as other sales taxes, it is apparent that there is no clear identification of the type of "political subdivision" of the state as it is intended to be. This court concludes that the RTD functions more like an arm of the state government, than any local county or municipal authority. Accordingly, the court must conclude that the RTD is not a person for § 1983 claims.

The court would also note the Plaintiff's second amended complaint fails to specify the capacity in which the (individual)

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Defendants are sued, and the only reference made is in the final paragraph of the complaint in which punitive damages are sought against the individual Defendants in their individual capacities. The court's holding is consistent with *Hafer v. Melo*, 60 U.S.L.W. 4001 (November 5, 1991), where the Supreme Court ruled that state officials sued in their individual capacities are persons within the meaning of § 1983. There are insufficient factual allegations to support a § 1983 claim against the individual Defendants and the nature of the legal claim against them is vague.

Because of the controversial nature of the court's ruling here that the RTD is not a "person" for 1983 purposes, and because the motions before the court are motions to dismiss, the court will also consider whether the Plaintiff has stated a claim in the event that RTD would be considered more like a municipal authority and thus subject to § 1983 liability in certain circumstances.

If the RTD is a person for § 1983 purposes, as an entity treated like a municipality, it is not liable for actions of its employees on a theory of respondeat superior or vicarious liability. *Monell v. New York City Dept. of Social Services*, 436 U.S. at 694-695 (1978). The initial inquiry in a case alleging municipal liability under § 1983 is the question of whether there is a direct causal link between a municipal policy or custom; and the alleged constitutional deprivation. *City of Canton, Ohio v. Harris*, 489 U.S. at 392. This is distinguished from the situation where an employee happens to apply the policy in an unconstitutional manner, which would base liability on respondeat superior. The Supreme Court in *City of Canton* took special care to carve out an exception allowing municipal liability where a facially constitutional policy exists, but is not

applied due to the failure of the municipality to train the employee adequately so as to avoid constitutional violations. It held that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whim the police come into contact. Where such a claim is made, liability will only attach if the identified deficiency in a city's training program is closely related to the ultimate injury, which in effect, allows liability only where the city's failure to train reflects deliberate indifference to the constitutional rights of its inhabitants. Justice White also noted that there will be no liability for the occasional negligent administration of an otherwise sound program, or for an allegation that an injury or accident could have been avoided if (the employee) had better or more training.

Accordingly, Plaintiff must establish the following to maintain a claim for municipal liability under § 1983: he must identify the deficiency in the training program which must be closely related to the ultimate injury to constitutional rights; there must be a direct causal link between the policy or custom and the alleged constitutional deprivation; and the allegation that the failure to properly train amounted to deliberate indifference to constitutional rights.

There is nothing in Plaintiff's second amended complaint which alleges or could be construed to allege the elements for a municipal liability claim cognizable under § 1983. The court notes that the conclusory allegations with regard to this issue in the Plaintiff's response to Defendant RTD's motion to dismiss at page 2, will not act to supplement the second amended complaint as it stands. The complaint is considered on its face for the purposes of Rule 12(b)(6). There is no allegation in the complaint which could be construed to allege that a

constitutional tort caused by an officially sanctioned or adopted statement of policy occurred. There is no allegation that the municipal officers who have final policymaking authority are subject to § 1983 liability or an allegation that such authority was delegated to any of the defendants by the policymaking authority. Plaintiff has also failed to allege that the policy itself is unconstitutional, and as a result actionable under § 1983. See *St. Louis v. Praprotnik*, 485 U.S. at 128. Accordingly, the Defendants (all of which are named or mentioned in the context of § 1983 claims) cannot be liable on Plaintiff's § 1983 claims against them.

The analysis of the first prong of § 1983, the violation of rights protected by the Constitution or laws of the United States, is contained in section IV below.

The Conspiracy Claim Under 42 U.S.C. § 1983

The conspiracy claim in the Plaintiff's complaint is vague. Plaintiff indicated at the hearing on these motions that he was not making any conspiracy claims under 42 U.S.C. § 1985(3).[1] Consequently, the court must surmise that the conspiracy claims are made in the context of the § 1983 claims. As underlying claim for violation of § 1983 has been dismissed, it might appear to moot the question of conspiracy here, but the court will nonetheless treat it as though it were otherwise viable.

The difficulty with the Plaintiff's conspiracy claim(s) is that the term conspiracy is used in very general terms in

1. *Curiously enough, the Plaintiff relies on* ***Lessman v. McCormick****, 591 F.2d 605 (10th Cir. 1979), a case involving a § 1985(3) conspiracy allegation, in support of his conspiracy claim in responding to the motions to dismiss.*

connection with not only 42 U.S.C. § 1983, but also 42 U.S.C. § 1981, and the alleged violation of certain constitutional rights. For example, the claims in paragraphs 1 and 2 refer to conspiracy, but without any specific reference to who the participants were and to what end they participated. No specific act or action is described in the conspiracy allegation in paragraph 1, only that all of the named defendants "engaged in a conspiracy with each other and unknown third persons for the purpose of depriving either directly or indirectly, the Plaintiff of his rights under 42 U.S.C. § 1981 and 1983, and the First, Fourth, Fifth, Ninth, and Fourteenth Amendment to the Constitution of the United States." Plaintiff's second amended complaint, para. 1. Paragraph 2 states merely that the Plaintiff was injured "in his person or property" by an unspecified conspiracy. These appear to be the only possible allegations regarding the alleged conspiracy in the Plaintiff's second amended complaint.

The two elements of a conspiracy claim under § 1983 are the same as those for a claim under § 1983: (1) that the plaintiff was deprived of a right secured by the Constitution and laws of the United States; and (2) plaintiff must show that defendant deprived him of this constitutional right under color of law. *Norton v. Liddel*, 620 F.2d 1375, 1378-79 (10th Cir. 1980). In the *Norton v. Liddel* case, the Tenth Circuit held that where a private individual actively conspires with an immune state official (acting under color of law) with the intent to purposely and knowingly deprive an individual of his rights secured under the Constitution of the United States, the fact that the State official is immune from suit in damages should not provide a windfall defense to the private conspirator. 620 F.2d at 1379-80. Conspiracy under § 1983 differs from § 1985(3) in important ways — § 1985(3) requires proof of a conspiracy, while § 1983

does not; § 1983 requires that a defendant acted under color of state law, while § 1985(3) does not; § 1985(3) requires proof that a conspirator's action was motivated by a class-based, invidiously discriminatory animus, while § 1983 conspiracy has no such requirement. *Dixon v. City of Lawton, Oklahoma*, 898 F.2d 1443, 1447 (10th Cir. 1990) (citations omitted).

As noted above, counsel for the Plaintiff indicated at the hearing on these motions that he was not making a § 1985(3) claim for conspiracy, and it is clear to the court that the facts necessary to support such a claim do not appear in the Plaintiff's second amended complaint. In considering an § 1983 conspiracy claim which might be pleaded in the complaint, the court notes that in order to recover under § 1983 conspiracy theory, a plaintiff must plead and prove not only a conspiracy, but also an actual deprivation of rights; pleading and proof of one without the other will be insufficient. *Dixon v. City of Lawton, Oklahoma*, 898 F.2d at 1449 (citations omitted). In addition, the Tenth Circuit has stated several times that when a plaintiff in a § 1983 action attempts to assert the necessary state action by implicating a state official in a conspiracy with private defendants, the pleadings must specifically present facts showing agreement and concerted action. *Hammond v. Bales*, 843 F.2d 1320, 1323 (10th Cir. 1988) (citations omitted). No specific acts appear in either claim referring to conspiracy. The court must accordingly conclude that due to the vague and unspecified nature of the alleged conspiracy claims made in the second amended complaint, the claims failed to meet the requisite pleading standards under either § 1985(3) or § 1983 conspiracy. The conspiracy claims must be dismissed.

Appendix E

II. Plaintiff's 42 U.S.C. § 1981 Claim

Plaintiff's complaint mentions § 1981 in its first paragraph concerning conspiracy and also states in paragraph 4 that the reason he was terminated was in retaliation for his filing charges with the Colorado Civil Rights Commission and the Equal Employment Opportunity Commission. The only factual allegations mentioned concerning § 1981 are in paragraph 4, and although the court will use the same factual allegation contained there for its analysis of the Title VII claim, this is the only factual allegation appearing in that paragraph. The case which is the touchstone for determining which type of activity is recoverable under § 1981 is *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

The decision in *Patterson v. McLean Credit Union*, 491 U.S. at 173, reaffirmed the holding in *Runyon v. McCrary*, 427 U.S. 160 (1976) that § 1981 prohibits racial discrimination in the making and enforcement of contracts. It cannot be construed as a general proscription of racial discrimination in all aspects of contract relations, for it expressly prohibits discrimination only in the making and enforcement of contracts. *Id.* at 176. In order to prevail under § 1981, a plaintiff must prove purposeful discrimination. *General Building Contractors v. Pennsylvania*, 458 U.S. 375 (1982). To establish a prima facie case, a § 1981 plaintiff must prove:

> he applied for and was rejected for an available position; that he was rejected; and that after he was rejected, respondent either continued to seek applicants for the position, or . . . filled the position with a white employee.

Patterson, 491 U.S. at 186-187, citing *McDonnell Douglas Corp. v. Burdine*, 450 U.S. 248, 254 (1981).

The *Patterson* court clearly held, at 177, that "the right to make contracts does not extend . . . to conduct by the employer after contract relationship has been established, including breach of the terms of the contract or imposition of discriminatory working conditions." The court reiterated at 179, in commenting on racial harassment in the workplace, that such conduct, reprehensible though it may be if true, is not actionable under § 1981, which covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal processes. The court then noted that conduct such as harassment would be actionable under the more expansive reach of Title VII.

There is no indication that the activity described in Plaintiff's complaint is covered by § 1981. Accordingly, the Plaintiff's § 1981 claim is dismissed, as the activity complained of as identified in the complaint is not actionable under that section of the Civil Rights Act.

III. Plaintiff's Title VII Claim

In *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), the Supreme Court established the elements of a prima facie case under Title VII. A Plaintiff must show four things: (i) that he belongs to a racial minority; (ii) that he applied for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. A plaintiff must also show that he filed a

complaint with the EEOC. Pursuant to § 706(e) of Title VII, a complainant must file a discrimination charge with the EEOC within 180 days of the occurrence of the alleged unlawful employment practice, or within 300 days if the proceedings are initially instituted with a state or local agency having "authority to grant or seek relief." *EEOC v. Commercial Office Products Co.*, 486 U.S. 107 (1988). The second amended complaint contains no allegations that would support any of these four elements of a prima facie case. Paragraph 4 of the complaint does state that "[t]he real reason why defendants RTD, Ed Rhatican, George Stanko, and Gregg Fisher terminated the Plaintiff from his employment was to retaliate against the Plaintiff for filing charges of national origin discrimination and retaliation against the RTD with the Colorado Civil Rights Commission and the Equal Employment Opportunity Commission." However, the court is unable to construe this allegation as to form the basis of a prima facie case for retaliation. There are also no allegations in Plaintiff's complaint which could factually support Plaintiff's compliance with § 706(e) of Title VII.

To establish a claim of retaliation under Title VII, a plaintiff must show: (i) a protected participation or opposition under Title VII known by the alleged retaliator; (ii) an employment action or actions disadvantaging person engaged in protected activities; and (iii) a causal connection between the first and second elements, that is, a retaliatory motive playing a part in the adverse employment actions. *Romero v. Union Pacific R.R.*, 615 F.2d 1303, 1307 (10th Cir. 1980). Plaintiff's claim in paragraph 4 fails to address the third prong of the retaliation claim. No facts are stated in the claim which the court could construe as pertaining to a causal connection or motive. Accordingly, Plaintiff's claim under Title VII must be dismissed.

Appendix E

At this point, the court would comment on the relationship between § 1981, § 1983, and Title VII in light of the approach which Plaintiff's complaint seems to take regarding the statutory purposes and remedial schemes of 42 U.S.C. §§ 1981 and 1983, and Title VII. Plaintiff misapprehends the relationship between these statutes as well as the boundaries of § 1981 and § 1983 and Title VII. In *Trujillo v. Grand Junction Regional Center*, 928 F.2d 973, 975 (10th Cir. 1991), the Tenth Circuit held that although the Supreme Court did not address directly the question whether discriminatory discharge is actionable under § 1981 in *Patterson, see Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990), the Court's language and reasoning show § 1981 is not available in such cases. This ruling was followed by the observation that the *Patterson* court refused to extend § 1981 to racial harassment cases because Title VII's remedial scheme would be circumvented if plaintiffs were permitted to bring their claims under § 1981.

To the extent that Plaintiff's complaint alleges violations of § 1981 and Title VII as bases for § 1983 violation, the court would appropriately dismiss any § 1983 claim based on these violations. *See Trujillo v. Grand Junction Regional Center*, 928 F.2d at 978. To the extent that Plaintiff's claims assert alternative ground for relief under Title VII and § 1983, the court would note that the Tenth Circuit has held that a plaintiff may not be precluded from suing under both Title VII and § 1983. *Brown v. Hartshorne School Dist. #1*, 864 F.2d 680, 682 (10th Cir. 1988). However, as noted above, the elements of a prima facie case, and theories of recovery are quite distinct, and Plaintiff has failed to plead separate claims under the two statutes. This court will not construct the Plaintiff's pleadings. Were there sufficient factual allegations in the complaint — and the court is of the opinion there are not, to link to the claims for relief,

the court would nonetheless decline the opportunity to so construct the Plaintiff's arguments. *Glenn v. First Nat. Bank in Grand Junction*, 868 F.2d 368, 371 (10th Cir. 1989). The rules of liberal construction of pleadings are of little assistance here. The court is unable to determine whether Plaintiff's claim under § 1983 which involves Title VII would also implicate rights protected by the Constitution. A plaintiff may base a § 1983 claim on actions proscribed by Title VII where those actions also violate the United States Constitution. *Polson v. Davis*, 895 F.2d 705, 710 (10th Cir. 1990).

The court must conclude that, by his allegations of conclusory facts, as well as the references to statutory as well as constitutional claims for relief as a "string cite," it is unable to detect the particular (factual) claim which the Plaintiff might assert relevant to a particular statute. This difficulty is compounded by the relationship between § 1981 and § 1983 along with Title VII, as outlined above. As a consequence, the court would also note that the Defendants have not received "fair notice" of the claims against them as required by Fed. R. Civ. P. 8, due to the Plaintiff's failure to provide well-pleaded facts (as opposed to conclusory allegations) which are linked with the legal claims asserted.

IV. Additional Constitutional Claims

Plaintiff has also asserted a right to privacy claim under the First, Fourth, Fifth, Ninth and Fourteenth Amendments. Here Plaintiff alleges simply that "since the Plaintiff was being investigated for disciplinary violations at the time of his refusal to submit to a psychiatric exam, the Plaintiff had a reasonable expectation of privacy with respect to his own thoughts and mental processes." Complaint at para. 5. This paragraph alleges

a violation of 42 U.S.C. § 1983 against Defendants RTD, Rhatican, Stanko and Fisher. Apparently the Plaintiff would assert a claim under the branch of the right of privacy of "the right to be let alone," as characterized by Justice *Brandeis in Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (quoted in *Whalen v. Roe*, 429 U.S. 589, 599 (1977)). In *McNally v. Pulitzer Publishing Co.*, 532 F.2d 69, 76 (5th Cir.) *cert. denied*, 429 U.S. 855 (1976), the Fifth Circuit discussed the right to privacy in terms relevant to the claim before this court. It said "The constitutional right of privacy is not to be equated with the common law right recognized by state tort law. Thus far only the most intimate phases of personal life have been held to be constitutionally protected (citations omitted)." The *McNally* court then noted that in applying the limited doctrine of constitutional privacy, the federal courts have generally rejected efforts by plaintiffs to constitutionalize tortious invasions of privacy involving less than the most intimate aspects of human affairs. *Id.* (citations omitted) at 76-77. There can be little doubt that Plaintiff has failed to assert a constitutionally protected right to privacy claim here as his claim does not involve a recognized fundamental right concerning a privacy interest. Accordingly, Plaintiff's claim concerning his right to privacy, contained in paragraph 5, is dismissed as either a § 1983 claim or as an independent claim.

In paragraph 6, Plaintiff alleges a § 1983 violation against the same Defendants as paragraph 5, (RTD, Rhatican, Stanko and Fisher), for deprivation of Plaintiff's liberty and property interest without procedural due process. This claim is framed as a § 1983 violation under the Fourteenth Amendment. Procedural due process guarantees apply only to those liberty and property interests encompassed by the Fourteenth Amendment. *Board of Regents v. Roth*, 408 U.S. 564 (1972). To state a claim for

such violation under § 1983, Plaintiff must first allege a property interest sufficient to warrant due process protection. *Jacobs, Visconsi & Jacobs v. City of Lawrence*, 927 F.2d 1111, 1115-16 (10th Cir. 1991) (citations omitted). Plaintiff has failed to allege the existence of any property right which could form the basis of a procedural due process claim. Because the Fourteenth Amendment is implicated, it is also necessary to examine the nature of the "state action" alleged to have caused the deprivation of due process. In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), the United States Supreme Court addressed the relationship between the § 1983 requirement of action under color of state law and the Fourteenth Amendment requirement of state action. The Supreme Court held that a broad reading of the § 1983 requirement "under color of state law" was appropriate, concluding that if the challenged conduct constitutes state action as delimited by its prior decisions, then that conduct was also action under color of state law and will support a § 1983 claim. 457 U.S. at 935. The Court noted later in the opinion that the state action requirement of the Fourteenth Amendment reflects judicial recognition of the fact that most rights secured by the Constitution are protected only against infringement by governments, citing *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 156 (1978).

For Fourteenth Amendment purposes, state action will only be found where the conduct allegedly causing the deprivation of a federal right can be fairly attributable to the state. This determination of what is "fairly attributable" involves a two-part inquiry: first, the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible; and second, the party charged with the deprivation must be a person who may fairly be said to be a state actor —

because he is a state official, has acted with them, or because his conduct is otherwise chargeable to the state. 457 U.S. at 937. In light of the pleading before this court, namely the Plaintiff's second amended complaint, the court is unable to conclude in light of the liberal pleading standard applicable on a motion under Rule 12(b)(6), that the Plaintiff has stated a claim for deprivation of procedural due process against any of the specified defendants for a constitutional denial of procedural due process. Plaintiff's claim for deprivation of procedural due process, as either a § 1983 or an independent claim, is dismissed.

Finally, Plaintiff asserts in paragraph 7 of his complaint, that the same Defendants as name in paragraphs 5 and 6, deprived him of substantive due process as guaranteed by the Fourteenth Amendment and § 1983. The Fourteenth Amendment's due process clause, apart from referring to a right to a fair hearing, also contains a substantive component. *See Moore v. City of East Cleveland*, 431 U.S. 494 (1977). If an individual's right to property is entitled to the protection of substantive due process, the state may not arbitrarily take that property from the owner. *Archuleta v. Colorado Department of Institutions*, 936 F.2d 483, 489 (10th Cir. 1991). There is no indication that the Plaintiff's deprivation of his job, or any other identifiable property forms the basis of the substantive due process claim. Dismissal of this claim is also proper in light of the considerations in the paragraph proceeding, particularly with reference to the requirements set forth in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

Plaintiff's Allegations Concerning the Arbitration of His Claims

In paragraphs 8 and 9, Plaintiff invokes jurisdiction in this court under § 185 of the Labor Management Relations Act

(LMRA). The court must note here that a mere assertion that a collective bargaining agreement is involved, in the same sentence as a citation to the Labor Management Relations Act § 185, will not provide for proper jurisdiction over the controversy — either under that statutory section, or in this court. Section 185 is the exclusive basis for suit concerning collective bargaining agreements, by and against labor organizations. Because Plaintiff has alleged in paragraphs 8 and 9 of his complaint that the public policy against invasion of privacy (paragraph 8) and procedural and substantive due process (paragraph 9) rights were violated by the arbitrator's decision, which allegedly interpreted the collective bargaining agreement, Plaintiff asserts jurisdiction is proper under § 185. It is not clear exactly who the defendant is for these two claims, but as they must, logically, involve the employer, RTD, the claim automatically fails, as RTD is specifically excepted from coverage of the LMRA as it is a political subdivision of the state 29 U.S.C. § 152(2). The blanket statement in paragraph 9 of the complaint that the arbitrator abused his discretion, fails to set forth sufficient facts for jurisdiction to be appropriate in this court. The two claims concerning the arbitration decision, contained in paragraphs 8 and 9, are accordingly dismissed.

Accordingly, Defendant RTD's motion to dismiss is GRANTED, Defendant ATU's motion to dismiss is GRANTED. With regard to the individual Defendants named in the second amended complaint, and on whose behalf a motion for summary judgment was filed, that motion for summary judgment is treated as motion to dismiss under Rule 12(b)(6) and is hereby GRANTED. The second amended complaint is DISMISSED in its entirety.

The scheduling conference set for December 17, 1991 at 8:30 a.m. is VACATED.

Appendix E

DATED at Denver, Colorado, this 10th Day of December, 1991.

BY THE COURT:

s/ Daniel B. Sparr
Daniel B. Sparr
United States District Judge